# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 19, 2011 |
| v | No. 290336<br>Oakland Circuit Court |
| JACOB TRAKHTENBERG,<br><br>Defendant-Appellant. | LC No. 2005-203484-FH |

Before: DONOFRIO, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant appeals by leave granted his bench trial convictions on three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13). Following remand, the trial court granted defendant's motion for relief from judgment based on ineffective assistance of counsel, but denied his motion based on newly discovered evidence. We reverse in part and affirm in part. Defendant's convictions are affirmed.

Defendant's convictions stem from the sexual assault of his daughter who was seven years old at the time. Although defendant had been charged with five counts of second-degree criminal sexual conduct, he was only convicted on three counts. One conviction arose from defendant having the victim touch his genital area—which the victim described as feeling like a "gushy ball." Defendant denied having the victim touch his genital area, but admitted that once after the victim complained of a stomachache, he showed her how to rub her stomach by taking her hand and rotating it around his stomach, but her hand did not touch his genital area. The court found the victim's testimony in this regard credible. The two other convictions arose from defendant touching the victim's vagina. Defendant admitted that he touched the victim's vagina on several occasions, but claimed that he had been applying ointment to treat a yeast infection at the request of the victim's mother—who denied making such requests. The court did not believe defendant's explanation.

On February 17, 2006, defendant filed a claim of appeal with this Court. Defendant's sole argument on appeal was that he was denied the effective assistance of counsel because trial counsel failed to impeach the victim's mother, Liliya Tetarly, with evidence showing that she was biased against him. This Court rejected the claim and affirmed defendant's convictions. *People v Trakhtenberg ("Trakhtenberg I")*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 268416). On September 10, 2007, our Supreme

Court denied defendant's application for leave to appeal. *People v Trakhtenberg*, 480 Mich 856; 737 NW2d 729 (2007).

Meanwhile, on February 6, 2006, Tetarly filed a civil action against defendant on behalf of the victim, alleging assault and battery and intentional infliction of emotional distress. Following a jury trial, a verdict of no cause of action was rendered.

On or about December 31, 2007, defendant filed a legal malpractice action against his criminal attorney, Deborah McKelvy. The trial court granted summary disposition in her favor, and this Court affirmed. *Trakhtenberg v McKelvy ("Trakhtenberg II")*, unpublished opinion per curiam of the Court of Appeals, issued October 27, 2009 (Docket No. 285247). On December 8, 2009, defendant filed an application for leave to appeal with our Supreme Court, which the Court is holding in abeyance pending a decision in this case. *Trakhtenberg v McKelvy*, ___ Mich ___; 780 NW2d 828 (2010).

On December 16, 2008, defendant filed in the trial court a motion for relief from judgment pursuant to MCR 6.500 *et seq*. Pertinent to this appeal, he argued that he was entitled to a new trial based on newly discovered evidence and ineffective assistance of counsel. He contended that numerous witnesses testified in the civil trial who did not testify at his criminal trial and that, with the additional evidence, he likely would have been acquitted. Defendant specifically relied on the following evidence:

- Hesskel Trakhtenberg, defendant's teenage son, testified that the victim told him that she missed defendant. Hesskel also claimed that the victim often asked defendant if she could come into his bedroom at night, and defendant yelled at her and told her to go back to her room. Hesskel also recalled telling the victim that it was wrong for her to go into defendant's bedroom.

- The victim testified that she did not like defendant and that Tetarly had told her that defendant married Tetarly and had a child with her only to obtain custody of Hesskel. The victim initially testified at the civil trial that both Tetarly and defendant had applied ointment to her vaginal area. She then changed her testimony and denied that defendant had ever applied ointment to her.

- Care House employee Amy Allen testified that she interviewed the victim one time. The victim told her that she touched defendant's "private area" twice and denied that he had ever touched her vagina. Following this interview, a police officer telephoned Tetarly and told her to ask the victim whether defendant had ever touched her "with his fingers." Tetarly advised the officer that the victim responded affirmatively to this question. Thereafter, the officer interviewed the victim and asked leading questions.

- The victim participated in counseling at Care House, which continued through the time of defendant's criminal trial. If called during the criminal trial, Allen could have testified regarding the proper forensic interviewing technique, including protecting a child from taint and suggestibility. She could have also testified that improper interrogation techniques can distort a child's recollection and undermine the reliability of her statements.

- Following defendant's criminal trial, he underwent a polygraph examination and the results were favorable to him.

Defendant argued that the above testimony and polygraph result were newly discovered and that McKelvy was ineffective for failing to call the witnesses to testify at his criminal trial. He contended that the evidence was not cumulative and likely would have changed the outcome of his trial.

On January 21, 2009, the trial court denied defendant's motion. The court determined that the additional testimony admitted at the civil trial would not have changed the outcome of the case if it had been admitted at defendant's criminal trial. The court noted that, although the victim's testimony had changed slightly, she did not recant her testimony that defendant had touched her "private part" and she had touched his "private part."

On February 11, 2009, defendant filed with this Court an application for leave to appeal, which this Court denied. *People v Trakhtenberg*, unpublished order of the Court of Appeals, entered March 20, 2009 (Docket No. 290336). On May 13, 2009, defendant filed an application for leave to appeal with our Supreme Court. On March 31, 2010, our Supreme Court remanded the case to this Court stating, in relevant part:

> [P]ursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. On remand, while retaining jurisdiction, the Court of Appeals shall remand this case to the Oakland Circuit Court to conduct an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine whether the defendant was deprived of his right to the effective assistance of counsel and whether the defendant is entitled to a new trial based on newly discovered evidence. At the conclusion of the hearing, the circuit court shall forward the record and its findings to the Court of Appeals, which shall then resolve the issues presented by the defendant. [*People v Trakhtenberg*, 485 Mich 1132; 779 NW2d 823 (2010).]

On May 19, 2009, this Court remanded this case to the trial court for the purposes directed in our Supreme Court's order. *People v Trakhtenberg*, unpublished order of the Court of Appeals, entered May 19, 2010 (Docket No. 290336).

Defendant's *Ginther*[1] hearing began on August 5, 2010. Tetarly testified that the victim, then 13 years old, was writing a book about what had happened to her and desired to have it published. Tetarly recalled that when the victim told her that defendant had placed her hand on his genital area, Tetarly believed that the victim was confused. Tetarly told the victim that defendant probably just wanted to warm up her hands by placing them between his thighs. The victim became angry and asked Tetarly why she always tried to excuse defendant's conduct. Tetarly claimed that she called Child Protective Services within 30 hours after the victim's

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

disclosure. She also claimed that, four days later, the victim disclosed that defendant had touched her vagina.

Tetarly testified that Hesskel was three years old when she moved in with defendant. According to Tetarly, on one occasion when she and Hesskel were alone, he told Tetarly that he wanted to show her how he kisses his mother. He said that his mother would lie on her back and he would "climb on top of her and [they] do wiggle [sic]." Hesskel also told her that he kissed his mother "on the titties" and the "pee-pee." Defendant and his ex-wife, Hesskel's mother, were involved in a custody dispute at that time and his ex-wife's visitation was suspended as a result of Hesskel's disclosures. Defendant was ultimately awarded custody.

Tetarly did not recall a detective telephoning her and telling her to ask the victim if defendant had ever touched her vagina. She did recall, however, calling a detective and telling him that the victim had indicated that defendant touched her at least twice on her vagina. Tetarly claimed that the victim overheard her say that the only reason that defendant married her and impregnated her was so that he could gain custody of Hesskel. Tetarly denied making that statement directly to the victim. Tetarly maintained that the victim did not have a yeast infection around the time that the victim said defendant had touched her vagina. Tetarly denied giving defendant ointment to apply to the victim's vaginal area.

Amy Allen, who testified at defendant's civil, but not criminal, trial testified at the *Ginther* hearing. The parties stipulated to Allen's qualifications as an expert in forensically interviewing children. Allen testified regarding the Michigan Forensic Interviewing Protocol, which includes preventing the "taint" of a child because of poor or leading questions. Allen was not aware that the victim had discussed the allegations with her youth pastor before Allen interviewed her. Allen asserted that it would have been useful to know this fact when she interviewed the victim. She interviewed the victim in March 2005, and the victim disclosed that she had touched defendant's "privates" on two occasions. She did not disclose that defendant had inappropriately touched her. After her interview with the victim, Allen became aware that the victim claimed that defendant had touched her vagina. Before the *Ginther* hearing, defendant's attorney told Allen that this disclosure was made when Tetarly asked the victim directly whether defendant had touched her vagina with his fingers. Allen testified that this method of questioning did not conform to the correct protocol and is the least preferred way to question a child. Allen indicated that some children initially disclose limited information about sexual molestation and thereafter disclose more details about the molestation.

Defendant, who was 73 years old at the time of the *Ginther* hearing, testified that he accumulated substantial wealth before he retired. After divorcing his second wife, there was a custody dispute over Hesskel and he was awarded custody. Eventually, problems developed between defendant and Tetarly and they divorced. Defendant claimed that he told his attorney, Deborah McKelvy, that Hesskel had yelled at the victim to go back to her bedroom when she wanted to go to defendant's bedroom. Defendant also claimed to have told McKelvy that Hesskel was sitting in the car when Tetarly asked defendant to apply the ointment to the victim's vagina to treat a yeast infection. Defendant gave McKelvy more than 800 pages of documents to review and told her that Tetarly had accused Hesskel's mother of molesting him, similar to her allegations against defendant regarding the victim. McKelvy did not offer any of the 800 pages as evidence in defendant's criminal trial. Defendant gave McKelvy a list of questions to ask

Hesskel, but she never talked to Hesskel outside of court. Further, defendant discussed with McKelvy the people he wanted to call as witnesses, but McKelvy did not present any witnesses other than defendant. Defendant further claimed that McKelvy did not allow him to testify regarding the animosity between he and Tetarly and his belief that Tetarly fabricated the allegations to obtain his money.

William Lansat also testified at the *Ginther* hearing. He was appointed to represent defendant in the proceedings to terminate his parental rights based on the victim's accusations. Defendant discussed with Lansat the witnesses that he wanted to testify in his criminal trial, including Hesskel, Tetarly, and Care House employees. Lansat instructed him to talk to McKelvy. Lansat told McKelvy that she could have copies of whatever documents were contained in his file regarding the termination case, and she accepted his offer. Lansat maintained that if he had gone to trial in the termination proceeding, he would have called Tetarly, Hesskel, and Care House employees to testify.

Jerome Sabbota, an expert in criminal defense, also testified at the *Ginther* hearing. He testified that in cases involving Care House, he requests all records pertaining to the Care House interview. He also testified that he would have called Allen to testify, cross-examined the victim about going into defendant's bedroom, cross-examined Tetarly, and, at a minimum, interviewed Hesskel. Regarding the uncertainty of the conduct that pertained to each charge, Sabbota testified that he would have filed a bill of particulars to "lock" the prosecution to a theory of which conduct pertained to which charge.

Lawrence Wasser, a forensic polygraph examiner, also testified at the *Ginther* hearing. He performed a polygraph examination on defendant and asked defendant three questions, all of which inquired whether defendant put his finger or ointment "into the lips of the victim's vagina." Defendant responded "no" to each question, and Wasser opined that defendant had been truthful.

Dr. Katherine Okla, a licensed clinical psychologist, testified regarding the Michigan Forensic Interviewing Protocol and how it pertains to this case. She opined that expert testimony could have assisted defendant's case by explaining how to weigh the victim's testimony and the reliability of her statements. She opined that the victim's statements to her mother were suspect, but conceded that defendant's admission that he touched her vagina allayed some of her concerns about the victim's claims being the result of violations of questioning protocol. Dr. Okla also testified regarding a notebook that contained the victim's description of the incidents. The trial court admitted the notebook as evidence.

Defendant's attorney, McKelvy, testified at the *Ginther* hearing. She acknowledged that the five charges in the information did not specify the conduct that pertained to each charge, that she waived a preliminary examination, and that she did not file a motion for a bill of particulars but maintained that these were matters of trial strategy. She believed that it would be difficult for the prosecution to prove the charges without having specified the conduct that constituted each charge. She also believed that the trial court would likewise be confused regarding which conduct pertained to which charge. In addition, McKelvy determined that it would benefit defendant if the prosecutor did not have an opportunity to see the victim testify before trial and that this was a factor in her decision to waive the preliminary examination.

Regarding the allegations that the victim touched defendant's genital area, McKelvy said that her strategy was to challenge the victim's credibility. McKelvy noted several inconsistencies in the victim's statements, the police reports, and the Child Protective Services report regarding how many times the touching occurred. With respect to the allegations that defendant touched the victim's vagina, McKelvy's strategy was to show that the touching was not for the purpose of sexual gratification. She explained that her strategy accounted for the fact that defendant admitted touching the victim's vagina on several occasions.

McKelvy denied that defendant gave her lists of proposed questions for witnesses. She decided not to call Hesskel as a witness because his testimony would not have been relevant to the issues whether the abuse occurred or whether defendant acted with sexual intent. She did not recall defendant telling her that Hesskel was present when Tetarly told him to apply the ointment. Every time she spoke with defendant, he added a new piece of information that she had not heard before. McKelvy did not allow defendant to testify regarding his acrimonious relationship with Tetarly because she wanted to make him seem as credible as possible. She also did not want to open the door to his personality traits and was aware that the psychological profiles of him were not complimentary. Moreover, she did not believe that defendant's relationship with Tetarly was relevant to whether he touched the victim for the purpose of sexual gratification. McKelvy did not interview Hesskel, Tetarly, or the Care House workers and did not call expert witnesses or psychologists because they could not testify regarding defendant's intent when he admittedly touched the victim's vagina multiple times. McKelvy believed that the primary issues in the case were whether defendant touched the victim for sexual gratification and whether he forced the victim to touch his genital area. Calling additional witnesses would not have assisted her strategy. Further, McKelvy did not pursue an "evil mom" defense because she believed it would open the door to testimony unfavorable to defendant—an unsympathetic witness in light of his personality.

On September 23, 2010, the trial court orally ruled on defendant's motion. The trial court opined that both the "no sexual gratification/denial" defense and the "sinister or bad mom" defense were viable, and McKelvy's determination to proceed with the "no sexual gratification/denial" defense was objectively reasonable. The court nevertheless determined that defendant was entitled to a new trial because he wished to present both defenses and presenting both defenses would have also been objectively reasonable. Thus, the trial court granted defendant's motion for a new trial on the basis of ineffective assistance of counsel. The court noted, however, that Tetarly was more credible than defendant and that her testimony and demeanor "did not reveal the sinister or conniving character defendant would have this court believe."

Regarding defendant's argument that he was entitled to a new trial based upon newly discovered evidence, the trial court determined that the victim's notebook and polygraph test results were the only evidence that could possibly qualify as newly discovered. The court rejected the contention that the remaining evidence was newly discovered, but acknowledged that its materiality may have been newly discovered. With respect to the victim's notebook, the trial court determined that its content did not constitute newly discovered evidence and that, at best, what was newly discovered was merely the medium through which the evidence was presented, i.e., the notebook. Further, the trial court determined that, even if the polygraph test

results constituted evidence, the evidence was cumulative of defendant's testimony and inadmissible at trial.

In accordance with our Supreme Court's directive, we now consider defendant's issues on appeal whether he was denied the effective assistance of counsel and whether newly discovered evidence warrants a new trial.

This Court reviews a trial court's decision on a motion for relief from judgment for an abuse of discretion and its findings of fact supporting its decision for clear error. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). Moreover, a decision is clearly erroneous if the reviewing court is left with a definite and firm conviction that an error occurred. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's factual findings for clear error and questions of constitutional law de novo. *Id.*

MCR 6.500 *et seq*. governs motions for relief from judgment in criminal cases. *Swain*, 288 Mich App at 629. Under MCR 6.508(D), "[t]he defendant has the burden of establishing entitlement to the relief requested." To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *Moorer*, 262 Mich App at 75-76.

Here, the trial court held that defendant is entitled to a new trial because McKelvy failed to present the "sinister or bad mom" defense that he requested. The trial court determined that both the "sinister or bad mom" defense and the "no sexual gratification/denial" defense, which McKelvy presented, were viable. Nevertheless, the court determined that McKelvy denied defendant the effective assistance of counsel by opting to present the "no sexual gratification/denial" defense to the exclusion of the "sinister or bad mom" defense. The trial court acknowledged that McKelvy's decision was objectively reasonable and "sound and insightful," but it opined that a decision to proceed with both defenses would have also been objectively reasonable. However, because the trial court determined that McKelvy's decision to present the "no sexual gratification/denial" defense to the exclusion of the "sinister or bad mom" defense was objectively reasonable, her representation did not fall below an objective standard of reasonableness and she did not render ineffective assistance of counsel on this basis. See *Pickens*, 446 Mich at 302-303; *Moorer*, 262 Mich App at 75-76. Indeed, the United States Supreme Court has recognized that it "has never required defense counsel to pursue every claim or defense, regardless of its merit, viability, or realistic chance for success." *Knowles v Mirzayance*, ___ US ___; 129 S Ct 1411, 1420; 173 L Ed 2d 251 (2009). Therefore, the trial court erred by determining that McKelvy provided ineffective assistance of counsel and abused its discretion by granting defendant a new trial on this basis.

Nevertheless, this Court will not reverse a correct decision that a trial court reaches for the wrong reason. *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005). Thus, this Court must determine whether defendant is entitled to a new trial under MCR 6.500 *et seq*. for a different reason.

Defendant also argues that he was denied his right to the effective assistance of counsel because McKelvy failed to establish the nature of the charges against him, failed to thoroughly investigate the case against him, failed to develop a reasonable trial strategy, failed to offer evidence that supported her chosen strategy, failed to call an expert witness regarding the forensic interviewing protocol, failed to require that the prosecution call its listed trial witnesses, and failed to adequately cross-examine the prosecution's witnesses. It is difficult to discern the precise claims relating to each purported deficiency because defendant did not organize his brief on appeal to separately address them. However, as the prosecution argues, MCR 6.508(D)(2) precluded the trial court from granting defendant's motion for relief from judgment on the basis that McKelvy was ineffective for failing to impeach Tetarly's testimony and establish her bias against defendant.

MCR 6.508(D)(2) precludes a court from granting a motion for relief from judgment if it "alleges grounds for relief which were decided against the defendant in a prior appeal . . . unless the defendant establishes that a retroactive change in the law has undermined the prior decision[.]" In defendant's direct appeal of his convictions in *Trakhtenberg I*, slip op at 1, he argued that McKelvy provided ineffective assistance of counsel by "failing to impeach Tetarly with evidence to show that she was biased against him." This Court affirmed defendant's convictions, reasoning:

> The evidence submitted on appeal related to incidents between defendant and Tetarly that occurred during an apparently acrimonious divorce more than four years before the charges of sexual abuse arose and there is no evidence that Tetarly was still bitter over those events. Even assuming that an inference of bias could be inferred from the events that occurred during the divorce, there is nothing in the record to suggest that defendant advised his attorney about those events and defense counsel "cannot be found ineffective for failing to pursue information that his client neglected to tell him." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005)]. [*Trakhtenberg I*, slip op at 2.]

Thus, this Court previously determined that McKelvy did not provide ineffective assistance of counsel by failing to impeach Tetarly and establish her bias. Because defendant has not shown, nor contended, that a retroactive change in the law undermines this Court's decision in *Trakhtenberg I*, MCR 6.508(D)(2) precludes relief on this basis. Although the trial court determined that it was not bound by *Trakhtenberg I*, this determination was erroneous pursuant to MCR 6.508(D)(2).

Moreover, the law of the case doctrine bars a result contrary to *Trakhtenberg I*. "Where a prior ruling of this Court concerns the same question of law in the same case, the doctrine of law of the case applies and the prior ruling is controlling. A legal issue raised in one appeal may not be raised in a subsequent appeal after proceedings held on remand[.]" *People v Osantowski*, 274 Mich App 593, 614-615; 736 NW2d 289 (2007), rev'd in part on other grounds 481 Mich 103

(2008), quoting *People v Stinson*, 113 Mich App 719, 730; 318 NW2d 513 (1982). Thus, defendant was not entitled to relief from judgment based on his argument that McKelvy provided ineffective assistance of counsel by failing to impeach Tetarly and establish her bias.

The prosecution also argues that this Court should adopt the reasoning in *Trakhtenberg II*, defendant's legal malpractice action against McKelvy, which addressed some of the same arguments that defendant raises in this appeal. We agree and conclude that defensive collateral estoppel bars the relitigation of issues pertaining to McKelvy's representation that were addressed in *Trakhtenberg II*.

"Collateral estoppel bars the relitigation of issues previously decided when such issues are raised in a subsequent suit by the same parties based upon a different cause of action." *Knoblauch v Kenyon*, 163 Mich App 712, 716; 415 NW2d 286 (1987); see, also, *Schlumm v Terrence J O'Hagan, PC*, 173 Mich App 345, 356; 433 NW2d 839 (1988). Moreover, "[c]rossover estoppel, which involves the preclusion of an issue in a civil proceeding after a criminal proceeding and vice versa, is permissible." *Barrow v Pritchard*, 235 Mich App 478, 481; 597 NW2d 853 (1999). In a context similar to the instant case, this Court upheld the application of crossover, or collateral, estoppel notwithstanding that the parties in each case were not identical. This Court held:

> [W]here a full and fair determination has been made in a previous criminal action that the client received the effective assistance of counsel, the defendant-attorney in a subsequent civil malpractice action brought by the same client may defensively assert collateral estoppel as a bar.
>
> In this case, the adequacy of defendant's representation was determined at plaintiff's motion for new trial in the criminal action. Plaintiff had a full and fair opportunity to present his case. The court ultimately refused to grant a new trial on grounds of ineffective assistance of counsel after hearing testimony and argument. On appeal, the parties fully briefed the issue, and it received thorough treatment in this Court. Under these circumstances, plaintiff was collaterally estopped from again raising the issue in a legal malpractice action. [*Knoblauch*, 163 Mich App at 725.]

This Court's holding was based on its determination that "the legal standards for ineffective assistance of counsel in criminal proceedings and for legal malpractice in civil proceedings are equivalent for purposes of application of the doctrine of collateral estoppel." *Id*. at 719.

This Court reached the same conclusion in *Barrow*, 235 Mich App at 479, 485, which also involved a former criminal client who filed suit against his criminal attorneys alleging legal malpractice. In analyzing the issue, the *Barrow* Court recognized that the standard for establishing ineffective assistance of counsel had changed since this Court's decisions in *Knoblauch* and *Schlumm*. Nevertheless, this Court determined that collateral estoppel was appropriate. *Id*. at 485. This Court stated:

> When this Court decided *Knoblauch* and *Schlumm*, the standard in Michigan for establishing ineffective assistance of counsel was controlled by

*People v Garcia*, 398 Mich 250, 264, 266; 247 NW2d 547 (1976)[, overruling recognized by *People v D'Alessandro*, 165 Mich App 569, 575; 419 NW2d 609 (1988)].

* * *

After *Garcia* was decided, however, and following this Court's decisions in *Knoblauch* and *Schlumm*, the standard for determining whether a defendant received the effective assistance of counsel changed. In *People v Tommolino*, 187 Mich App 14, 17, n 1; 466 NW2d 315 (1991), this Court recognized that the United States Supreme Court's decision in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), not *Garcia*, *supra*, set the standard for whether a defendant has received effective assistance of counsel.[2]

* * *

Accordingly, we are called upon in this case to decide whether *Knoblauch* and *Schlumm* continue to represent the state of the law in Michigan. We hold today that they do. In order to establish a cause of action for legal malpractice, the plaintiff has the burden of establishing the following elements: (1) the existence of an attorney-client relationship (the duty); (2) negligence in the legal representation of the plaintiff (the breach); (3) that the negligence was a proximate cause of an injury (causation); and (4) the fact and extent of the injury alleged (damage). *Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995). As previously indicated, in order for a defendant in a criminal case to establish that he did not receive the effective assistance of counsel, he must show (1) that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment, and (2) that the deficiency was prejudicial to the defendant. *Tommolino*, *supra* at 17, citing *Strickland*, *supra*.

There is ample authority in other jurisdictions to support the conclusion that, for purposes of collateral estoppel, the standards for establishing ineffective assistance of counsel in a criminal forum and legal malpractice in a civil suit are equivalent. See, e.g., *Rowe v Schreiber*, 725 So 2d 1245 (Fla App, 1999); *Kramer v Dirksen*, 296 Ill App 3d 819; 231 Ill Dec 169; 695 NE2d 1288 (1998); *Sanders v Malik*, 711 A2d 32 (Del [Supr], 1998); *Ray v Stone*, 952 SW2d 220 (Ky App, 1997); *Gill v Blau*, 234 AD2d 506; 651 NYS2d 182 (1996); *Younan v Caruso*, 51 Cal App 4th 401; 59 Cal Rptr 2d 103 (1996); *Zeidwig v Ward*, 548 So 2d 209 (Fla, 1989); *Johnson v Raban*, 702 SW2d 134 (Mo App [ED], 1985).

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[2] In *Pickens*, 446 Mich at 326, our Supreme Court determined that the Michigan Constitution does not afford greater protection than the federal constitution regarding a defendant's right to the effective assistance of counsel.

> Although case-law discussion of the requirements to establish ineffective assistance of counsel and legal malpractice may contain language disparity, we believe the standards are sufficiently similar in substance to support the application of the defense of collateral estoppel. The first step of the *Strickland* standard and the breach element of a claim of legal malpractice are the same, i.e., trial counsel must act reasonably. Further, the second step of the *Strickland* standard (prejudice) and the causation element of a claim of legal malpractice are also the same, i.e., a defendant must show that trial counsel's alleged deficiency affected the outcome of the criminal trial. Finally, although defendants were not parties to plaintiff's motion for a new trial based on ineffective assistance of counsel in the federal court, we agree with this Court's extensive analysis in *Knoblauch*, *supra* at 719-725, that mutuality of estoppel is not necessary before a defendant in a legal malpractice action can use the defense of collateral estoppel. [*Barrow*, 235 Mich App at 482-485 (footnotes omitted; footnote added).]

The cases from other jurisdictions cited above involve the application of collateral estoppel to bar a criminal defendant's subsequent malpractice claim against an attorney based on deficient representation. Although we were unable to locate any cases applying collateral estoppel in the civil to criminal context, we conclude that collateral estoppel applies in the circumstances presented here. The reasoning of *Barrow* supports the application of collateral estoppel in this case because the requirements necessary to establish legal malpractice and ineffective assistance of counsel are "sufficiently similar in substance." *Barrow*, 235 Mich App at 484-485. Collateral, or crossover, estoppel may preclude the litigation "of an issue in a civil proceeding after a criminal proceeding *and vice versa*[.]" *Id*. at 481. Further, mutuality of estoppel is not necessary for collateral estoppel to apply. *Id*. at 485.

In *Trakhtenberg II*, slip op at 5-8, this Court addressed many of the issues that defendant raises in this appeal. This Court stated:

> Plaintiff [Trakhtenberg] alleged in his legal malpractice complaint that defendant [McKelvy] committed the following acts of malpractice: failing to call crucial witnesses (such as plaintiff's son, Hesskel Trakhtenberg), failing to meaningfully cross-examine prosecution witnesses, failing to cross-examine plaintiff's ex-wife, persuading plaintiff to waive his right to a jury trial, failing to conduct adequate direct examination of plaintiff, failing to generally test the prosecutor's case, failing to generally defend plaintiff's case by failing to call defense witnesses, failing to properly examine the witnesses that were called, and failing to introduce or reference any exhibits or documents, failing to protect plaintiff's legal rights, and failing to comply with the standard of practice and care, the canons of ethics, and the Michigan Rules of Professional Conduct.
>
> We find that defendant acted as would an attorney of ordinary learning, judgment or skill under the same or similar circumstances, and her alleged acts and omissions were matters of trial tactics based on reasonable professional judgment.

Plaintiff was convicted of three counts of CSC II, MCL 750.520c(1)(a), which provides:

> (1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age.

MCL 750.520a(q) defines "sexual contact" as "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification . . . ."

In this case, plaintiff did not dispute the victim's age, and plaintiff admitted at his criminal trial that he touched the victim's vagina. Therefore, the primary issue at trial was whether plaintiff engaged in contact with the victim "for the purpose of sexual arousal or gratification[.]" MCL 750.520a(q). A reasonable person standard governs a determination of the purpose for the contact. *People v Piper*, 223 Mich App 642, 647; 567 NW2d 483 (1997). "[A] jury is properly limited to a determination whether the defined conduct, when viewed objectively, could reasonably be construed as being for a sexual purpose." *Id*.

At trial, plaintiff testified that he touched the victim's vagina to apply ointment and as a remedy for her stomach pain. Given the narrow issue at trial, it was reasonable for defendant to conclude that numerous witnesses would not benefit plaintiff's case. Plaintiff testified regarding why he touched the victim's vagina. It is difficult to conceive how additional witnesses could shed light on this issue, and plaintiff does not explain how the testimony of additional witnesses would have explained whether plaintiff touched the victim "for the purpose of sexual arousal or gratification[.]" MCL 750.520a(q). Because "it is a tactical decision whether to call particular witnesses" and there is no evidence that defendant did not act with full knowledge of the law or in good faith, defendant's decision not to call additional witnesses was within the protection of the attorney judgment rule. *Simko, supra* at 660.

Similarly, defendant's decision not to cross-examine plaintiff's ex-wife and her cross-examination of other prosecution witnesses and direct examination of plaintiff were also matters of trial strategy. Even if another attorney would have elected to cross-examine plaintiff's ex-wife or asked different questions in cross-examining other prosecution witnesses and direct examining plaintiff, there is no evidence that defendant did not act with full knowledge of the law and in good faith. Decisions such as whether to cross-examine a witness and the extent to cross-examine witnesses are tactical decisions, which "do not constitute grounds for a legal malpractice action." *Id*.

* * *

> Defendant's decision not to introduce or refer to any exhibits was also not actionable. On appeal, plaintiff does not assert what exhibits or documents defendant should have introduced or referenced. In any event, decisions regarding what evidence to present is a matter of trial strategy. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).
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> Finally, plaintiff argues that the stark contrast between the presentation of evidence in his criminal case and the victim and her mother's civil case against him and the divergent results of the criminal case (guilty verdicts on three charges) and the civil case (judgment of no cause of action) create a genuine issue of material fact regarding whether defendant's conduct is protected by the attorney judgment rule. The fact that there was a judgment of no cause of action in a civil case against plaintiff that contained some tort claims that were based on plaintiff's convictions of sexually abusing the victim is not germane to whether defendant's representation of plaintiff in the criminal case was deficient. The issue is whether, in defending plaintiff in the criminal case, defendant acted with the knowledge, skill, and ability ordinarily possessed by members of the legal profession and whether she acted in good faith and with the honest belief that her acts were well founded in the law and in the best interests of plaintiff. See *Mitchell [v Dougherty*, 249 Mich App 668], *supra* at 677[; 644 NW2d 391 (2002)]. For all the reasons stated above, we find that defendant acted as would an attorney of ordinary learning, judgment or skill under the same or similar circumstances, and her alleged acts and omissions were a matter of trial tactics based on reasonable professional judgment. [*Trakhtenberg II*, slip op at 5-8 (footnotes omitted).]

Because defendant had a full and fair opportunity to present his arguments in *Trakhtenberg II*, and this Court ruled on his arguments, we conclude that collateral estoppel bars the relitigation of those issues. See *Knoblauch*, 163 Mich App at 716.

Accordingly, this Court's analysis of defendant's arguments is limited to those arguments that this Court did not previously decide in *Trakhtenberg I* or *Trakhtenberg II*. In *Trakhtenberg I* and/or *Trakhtenberg II*, this Court addressed McKelvy's decisions regarding the introduction of evidence, including exhibits, calling additional witnesses, cross-examining Tetarly, and cross-examining the prosecution's other witnesses. Therefore, we turn to the remaining claims.

Defendant argues that McKelvy was ineffective for failing to take steps to establish the nature of the charges against him and for failing to investigate the charges against him. We disagree. Defendant was charged with five counts of second-degree criminal sexual conduct, all of which alleged that he "engage[d] in sexual contact with another person, to-wit: [the victim], said person being under 13 years of age[.]" Thus, the information did not specify the conduct that pertained to each charge.

McKelvy testified that she waived defendant's preliminary examination and did not file a motion for a bill of particulars to ascertain the conduct that constituted each charge as a matter of trial strategy. She believed that, considering the number of touches alleged, it would be difficult for the prosecution to prove the charges without having specified the conduct that pertained to each charge. She further believed that the trial court would likewise be confused regarding the charges. McKelvy's strategy was partially successful because the trial court acquitted defendant of two charges and acknowledged that it was confused regarding the charges. Accordingly, the record shows that McKelvy's decision not to ascertain the conduct that pertained to each charge was a matter of trial strategy. Because defendant has failed to show otherwise, McKelvy did not provide ineffective assistance of counsel in this regard. See *Toma*, 462 Mich at 302.

Defendant also contends that McKelvy was ineffective for failing to develop a reasonable trial strategy. Again, the record belies defendant's argument. McKelvy testified that she relied on the inconsistencies in the victim's statements, the police report, and the Child Protective Services report regarding the number of times that she touched defendant's genital area. Her strategy was to challenge the victim's credibility on this issue considering the inconsistencies. Moreover, regarding the allegations that defendant touched the victim's vagina, McKelvy maintained that her strategy was to show that the touching was not for the purpose of sexual gratification, which is an element of second-degree criminal sexual conduct. She explained that her strategy accounted for the fact that defendant admitted touching the victim's vagina on several occasions.

The strategy that McKelvy employed was reasonable. She focused on defendant's admissions to negate an element of the offenses and focused on the victim's inconsistencies to cast doubt on her credibility. Even the trial court on remand acknowledged that McKelvy's strategy to focus on the "no sexual gratification/denial" defense was reasonable. Accordingly, defendant fails to establish that McKelvy's representation fell below an objective standard of reasonableness and deprived him of a fair trial. See *Pickens*, 446 Mich at 302-303; *Moorer*, 262 Mich App at 75-76. Because defendant was not denied the effective assistance of counsel, the trial court abused its discretion by granting his motion for relief from judgment based on this claim and this decision is reversed.

Next, defendant argues that he is entitled to a new trial based upon evidence that was discovered after he was convicted where that evidence is not cumulative, could not have been discovered and produced prior to the criminal trial, and would probably cause a different result on retrial. Again, this Court reviews a trial court's decision on a motion for relief from judgment for an abuse of discretion and its findings of fact supporting its decision for clear error. *Swain*, 288 Mich App at 628.

> For a new trial to be granted on the basis of newly discovered evidence, it must be shown that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) including the new evidence upon retrial would probably cause a different result; and (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial. [*People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996); see, also, *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).]

Here, defendant fails to establish that he is entitled to a new trial based on newly discovered evidence. He erroneously argues that all of the evidence presented at the civil trial and the *Ginther* hearing was newly discovered. Evidence is not newly discovered when a witness and his or her potential testimony is known, or should have been known, before trial. *People v Terrell*, ___ Mich App ___; ___ NW2d ___ (Docket No. 286834, issued August 26, 2010), slip op at 10; *Swain*, 288 Mich App at 634-635. Tetarly and the victim testified at defendant's criminal trial, and McKelvy determined that Hesskel's testimony was not necessary. McKelvy was also aware that Amy Allen had interviewed the victim at Care House and decided not to interview Allen or call her to testify. Therefore, these witnesses were known before trial and their post-criminal trial testimony does not constitute newly discovered evidence. Further, Dr. Okla's testimony could have been discovered before trial if McKelvy's strategy had involved presenting expert testimony. Thus, Dr. Okla's testimony likewise does not constitute newly discovered evidence.

McKelvy admitted at the *Ginther* hearing that she was unaware that the victim had spoken to two individuals other than Allen at Care House. Thus, she was unaware of Care House workers Ana Burgos and Rachel Hughes before trial. Burgos was the victim's therapist from May through August of 2005. Burgos opined that the victim presented symptoms consistent with children who had been abused. On one occasion, the victim told Burgos that she wanted to kill herself, had nightmares every night, and did not feel safe. Hughes took over as the victim's therapist in September 2005. The victim told Hughes that she had been sexually abused. She described to Hughes that defendant had asked her to rub his stomach and pushed her hand lower to his "private parts." Accordingly, Burgos' and Hughes' testimony was not favorable to defendant, and he fails to indicate how its admission would result in a different outcome on retrial.

Defendant also underwent a polygraph examination after his criminal trial, which indicated that he answered the precise questions asked truthfully. Assuming that this evidence is newly discovered and that it would be admissible on retrial, defendant fails to establish that it would make a different result probable. Wasser, the polygraph examiner, testified that he asked defendant three questions, all of which inquired whether defendant had put either his finger or ointment "into the lips of [the victim's] vagina[.]" Because defendant was not charged with sexual penetration, but rather with sexual contact, the polygraph test results would be irrelevant if he was retried. Accordingly, defendant has not shown that the admission of the test results on retrial would likely result in his acquittal.

Finally, Tetarly testified at the *Ginther* hearing that the victim was in the midst of writing a book about what had happened to her. The victim told Tetarly about the book approximately one week before the hearing. A copy of the notebook containing the victim's writings was admitted as evidence. Nothing indicates that the notebook existed or could have been discovered before trial. Thus, it appears to be newly discovered evidence. The notebook, however, is not favorable to defendant and would not make a different result likely on retrial. In the notebook, the victim describes how defendant forced her to touch his genital area and how he unzipped her pajamas and touched her "below the belt." She stated that she did not know what defendant was doing and that she did not like it. She further stated that she did not know whether defendant perceived her "as a daughter or as bait." Thus, the notebook is cumulative of portions of the victim's criminal trial testimony and defendant has not established that its admission on retrial

would likely result in his acquittal. As such, the trial court properly denied defendant's motion for relief from judgment based on newly discovered evidence.

Reversed in part and affirmed in part. Defendant's convictions are affirmed.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens